

Office of Legislative Counsel

17 MAR 1978

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Frey:

I am writing in response to a request for views on the Department of Justice's proposed amendments to S. 2117, a bill to amend the Federal Tort Claims Act. The proposed amendments would establish procedures for the conduct of an inquiry into whether a person's constitutional rights have or may have been violated by the tortious conduct of a Federal employee acting within the scope of his employment or under color thereof. There is no requirement that the inquiry result in disciplinary action.

This procedure would generally include participation in the inquiry by the aggrieved party and could result in his access to information surrounding the activity which is the subject of the inquiry. In addition, the proposed procedure would grant a right of appeal to the Civil Service Commission, which would conduct a de novo review of the claim and issue a final decision. As you are aware, a great deal of the information with which the Central Intelligence Agency deals is not available to the public. This is because the information is either classified pursuant to Executive Order or relates to intelligence sources and methods. In the latter case, the Director of Central Intelligence has a statutory responsibility to protect such information from unauthorized disclosure (50 USC 403 (d)(3)). The proposed amendments recognize this situation and provide that an agency need not notify a person of an agency-initiated inquiry if the head of the agency determines that to do so would not be in the interests of the national security (paragraph 7802(a)(3)). This exception is necessary and must be retained. This language, however, should be clarified. The "notification" referred to in the current language could be construed as referring to notification of any action taken during an inquiry rather than to notification of the inquiry itself, which is the correct interpretation.

Proposed subsection 7805(a) of title 28 United States Code states that, except as otherwise provided, the Civil Service Commission will issue regulations for the implementation of the proposed procedure by each Federal agency. In general the Central Intelligence Agency is not subject to regulations issued by the Civil Service Commission. As a result, I propose that a new subsection be added as follows:

"(c) The Director of Central Intelligence, within 90 days of enactment of this chapter, shall issue such regulations as he deems necessary and appropriate for the implementation of sections 7801 - 7804 of this chapter by the Central Intelligence Agency."

Proposed subsection 7802(b) provides that each Federal agency covered by the regulations described in section 7805 shall issue rules, regulations and instructions entitling an aggrieved person to certain procedural rights. The purpose of these additional rules, etc., appears to be to permit each Federal agency to adopt the general rules of proposed section 7805 to its particular situation. Because, as proposed above, the Director of Central Intelligence would issue specific rules for this Agency under proposed section 7805, additional rules, regulations or instructions would not be necessary. Line 4 of proposed subsection 7802(b), therefore, should be amended to read as follows:

"applicable shall issue such further rules, regulations and instructions as necessary."

Also, the proposed paragraph 7802(b)(1) requires clarification. This provision gives an aggrieved party certain rights to participate in an agency conducted inquiry concerning a constitutional tort committed by an employee. As presently drafted the paragraph could be construed as giving the aggrieved party the right to participate in every stage of the hearing. This would be inappropriate, especially in a proceeding which may involve national security information. I suggest that the first two lines of the paragraph be amended to read as follows:

"(1) participate by submitting a statement, and if a hearing is held by giving testimony, pursuant..."

Further, proposed paragraph 7802(b)(2) provides for an appeal to the Civil Service Commission of the action taken by a Federal agency on a complaint. For the reasons enumerated earlier, such a procedure would not be acceptable to the Central Intelligence Agency. I recognize, however, the need in these cases for an appeal mechanism outside the agency concerned. The appropriate body to perform this function regarding complaints involving the Central Intelligence Agency would seem to be the Intelligence Oversight Board, which is charged by Executive Order 12036 with reviewing allegations of unlawful or improper intelligence activities. I propose, therefore, that paragraph 7802(b)(2) be amended by:

(a) adding "or an employee of the Central Intelligence Agency" after "Code" in line 5; and

(b) deleting the period after "Code" in line 8 and adding ", or (c) to the President or such entity as he shall designate in the case of employees of the Central Intelligence Agency."

The effect of these amendments would be to remove the Central Intelligence Agency from the Civil Service Commission appeals process and to permit the President to establish the Intelligence Oversight Board as the arbiter in the case of employees of the Central Intelligence Agency.

An additional problem is presented by proposed section 7803. This section provides for inquiries into claims against former Government employees and against employees appointed by the President. The Civil Service Commission would conduct the inquiries relating to such of these persons who are not or were not uniformed members of the Armed Services. Such procedures, if applied to the Central Intelligence Agency, would be incompatible with the security considerations and the Agency's autonomy from the Civil Service Commission outlined above. I suggest, instead, that the portion of the proposed section describing who will conduct the inquiries be amended to read as follows:

"by (a) except as otherwise provided, the Civil Service Commission, by (b) the Secretary of Defense if the former employee or Presidential employee is a uniformed member of the Armed Forces as described in section 101(4) of title 10 of the United States Code, by (c) the Director of Central Intelligence if the former employee was employed by the Central Intelligence Agency, or by (d) the Attorney General if the Presidential appointee holds or held office in the Central Intelligence Agency,".

Proposed section 7804 grants the aggrieved party the right to petition a district court of the United States for review of a final decision under proposed subsection 7802(b)(2). Because of the possibility that sensitive foreign intelligence information may be included in such a review, I propose that the following sentence be added to the end of the section:

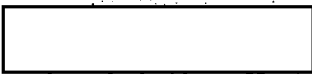
"Any review of a final decision will be held in camera if the decision involves matters specifically protected from disclosure by statute or executive order or the District Court determines that in camera review is in the interests of national security."

My final comment concerns proposed section 7806 which states that nothing contained in the proposed chapter shall affect the rights which an employee would have under other provisions of law and in no case shall the employee have lesser rights than the aggrieved party possesses under the proposed chapter. Based on discussions with the Department of Justice, I believe that the intent of this section is only to insure that the proposed chapter is not utilized to limit rights otherwise granted to an employee who is the subject of a disciplinary hearing. The second half of the section would, however, elevate the rights of an employee to at least those enumerated in the proposed chapter. Subsection 403(c) of title 50 of the United States Code grants the Director of Central Intelligence the authority to terminate an employee when the Director deems it in the interests of the United States. The mandate of employee rights made by this section is in direct conflict with the Director's statutory authority. The conflict would be resolved in a manner consonant with the purpose of the section by placing a period after "law" in line 4 and deleting the remainder of the section.

Thank you for the opportunity to comment on this legislation.

Sincerely,

SIGNED


Acting Legislative Counsel

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